S. HRG. 98-58

THEODORE J. GARRISH NOMINATION

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON THE

NOMINATION OF THEODORE J. GARRISH TO BE GENERAL COUNSEL, DEPARTMENT OF ENERGY

APRIL 25, 1983

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THEODORE J. GARRISH NOMINATION

MONDAY, APRIL 25, 1983

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 10:07 a.m., in room SD–366, Dirksen Office Building, Hon. James A. McClure, chairman, presiding.

Present: Senators McClure, Warner, and Hecht.

Also present: Charles A. Trabandt, chief counsel; E. David Doane, deputy chief counsel; and D. Michael Harvey, chief counsel for the minority.

OPENING STATEMENT OF HON. JAMES A. McCLURE, A U.S. SENATOR FROM THE STATE OF IDAHO

The CHAIRMAN. The committee will come to order.

This is a hearing to consider the Presidential nomination of Theodore J. Garrish to be General Counsel of the Department of Energy. Mr. Garrish has a professional background that includes a variety of positions as an attorney in the Federal Government as well as 3 years in private law practice.

He is currently serving as Special Assistant to the Secretary of Energy. He has previously served as Legislative Counsel for the Department of the Interior and General Counsel of the Consumer Product Safety Commission.

During his career in Government service, Mr. Garrish has demonstrated his ability to carry out the responsibilities that he will assume as DOE General Counsel. His professional experience includes management and administration, litigation, enforcement of Federal programs, development of regulations, and involvement in the legislative process.

Mr. Garrish is clearly well-qualified for the position of DOE General Counsel, and I am pleased to welcome his appearance before the committee as the President's nominee.

At this time it is also my pleasure to recognize the senior Senator from Virginia, a valued member of the committee, Mr. Warner, who will introduce Mr. Garrish to the Committee.

Senator Warner?

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you very much, Mr. Chairman, members of the committee, staff who have gathered here this morning

to welcome Theodore Garrish who will hopefully soon be the President's nominee for General Counsel of the Department of Energy.

As such he will be the chief legal officer in this very important Department. He comes to us well-prepared for his new responsibility. He received his undergraduate degree from the University of Michigan and on to earn his law degree cum laude from Wayne State University.

He is currently serving as the Special Assistant to the Secretary. Part of that time he worked as Legislative Counsel for the Department of the Interior. He is significantly involved with a number of energy issues such as oil, shale, geothermal, and numerous aspects of oil and gas development on the Outer Continental Shelf.

Previous to his tenure at the Interior Department, Mr. Garrish specialized in natural resources in private practice of law. Before going into the private practice, he served as General Counsel of the Consumer Product Safety Commission and also directed the enforcement operations of the Commission during his tenure there.

Mr. Garrish has also had significant litigation experience with the U.S. Department of Justice and other agencies. Mr. Chairman, the committee, as you can see, a review of his background of the nominee reveals he has the skills needed to serve in the position of General Counsel for the Department of Energy...

It is a great pleasure to present Theodore Garrish to the chairman and members of the committee. Good luck. You are on your own. (Laughter.)

The CHAIRMAN. Thank you very much, Senator.

[The committee received the following statement from Senator Trible:]

U.S. SENATE,
Washington, D.C., April 25, 1983.

Hon. JAMES A. MCCLURE,
Chairman, Committee on Energy and Natural Resources, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I was unable to be present this morning for the confirmation hearing of Theodore J. Garrish as the General Counsel of the Department of Energy.

I would appreciate it, however, if the attached statement could be placed in the record.

Sincerely,

PAUL TRIBLE.

Enclosure.

STATEMENT OF HON. PAUL TRIBLE, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Mr. Chairman, I appreciate this opportunity to recommend to the Committee and to our colleagues in the Senate the confirmation of Mr. Theodore J. Garrish as the General Counsel of the Department of Energy.

Mr. Garrish has had a most distinguished career in government service and in the private sector. His broad background in the field of law and his speciality in energy and of natural resource issues makes him exceptionally well qualified for the position. Mr. Garrish is fully aware of the magnitude of the responsibilities which he will be facing as General Counsel in this agency, and he is approaching this prospective new position with the appropriate level of respect and resolution. I am convinced that he will continue to serve our country in the dedicated and professional manner which he has shown in the past.

The Federal Government and the Department of Energy are very fortunate in having a man of the ability, the character and the dedication of Theodore J. Garrish as a nominee for this important position. I strongly recommend him to the Commit-

tee. I feel he will do an outstanding job for the Department of Energy and for our Nation.

Mr. CHAIRMAN. Mr. Garrish, the rules of the committee which apply to all nominees require that they be sworn in connection with their testimony. Please rise and raise your right hand.

[Whereupon, Theodore J. Garrish was duly sworn by the chairman.]

The CHAIRMAN. Please be seated.

Before you begin your statement, there are four questions addressed to witnesses before this committee who are nominated to positions in the administration. I would like to ask these questions of you now.

Will you be available to appear before this committee and other congressional committees to represent departmental positions and respond to issues of concern to Congress?

Mr. GARRISH. I will.

The CHAIRMAN. Your informational statement has been submitted to the committee. However, it is required that this statement be made public unless the committee decides special circumstances justify an exception.

Do you have any objection to the publication of your informational statement?

Mr. GARRISH. I have no objection to that.

The CHAIRMAN. Are you aware of any personal holdings, investments, or interests that could possibly constitute a conflict of interest or create the appearance of such a conflict should you be confirmed and assume the office to which you have been nominated by the President?

Mr. GARRISH. My investments, personal holdings, and other interests have been reviewed both by myself and the appropriate ethics counselors within the Federal Government.

I have taken appropriate action to avoid any conflict of interest in the manner stated on my standard form 278 dated January 5, 1983. It is also reported in question 5, page 5, of the Senate questionnaire.

I have been advised by the Assistant General Counsel for Standards of Conduct at the Department of Energy that such information contained therein discloses no conflict of interest under applicable laws and regulations and to my knowledge there are no conflicts of interests or appearances thereof.

The CHAIRMAN. Are you involved in or do you have any assets held in blind trusts?

Mr. GARRISH. I do not.

The CHAIRMAN. Thank you very much, Mr. Garrish. You may proceed.

STATEMENT OF THEODORE J. GARRISH, NOMINEE TO BE GENERAL COUNSEL, DEPARTMENT OF ENERGY

Mr. GARRISH. Thank you very much, Mr. Chairman, Senator Warner.

It is a pleasure for me to appear here today as the President's nominee for General Counsel to the Department of Energy. I am grateful for the introductions that have been made.

You have before you a statement which has been circulated to the committee and I will not take time this morning to read it.

The CHAIRMAN. We will put it in the record in full. You may proceed.

Mr. GARRISH. Thank you very much.

There are several points I would like to summarize this morning which I believe are important to emphasize.

First, I recognize that, if confirmed, I will be accountable to this committee and to the Congress to insure that the Department faithfully administers the laws for which it has been entrusted. Congressional oversight plays an important role in our system of government and I look forward to working with the Congress in dealing with the problems we face.

Second, I believe it is extremely important that the advice I render to the Department properly reflects the legislative intentions of the Congress in passing the laws we administer without regard to the political views or personal preferences of the General Counsel or others.

I have discussed this matter with Secretary Hodel and he fully expects me to render legal advice on the basis of my best professional judgment as to what the law is , not what someone would like it to be, and I am both intellectually and philosophically committed to this approach.

Finally, as is more completely set forth in the answers to the committee's questionaire and my written testimony, I believe I have the skills and the background through my prior experience to continue the professionalism I have found to exist in the Office of General Counsel.

This experience has included management of large legal staffs, handling complicated issues. My experience has ranged from general counseling to enforcement, regulation, litigation, and legislation. I believe that this background will be invaluable to me in this new position.

With that, I would be pleased to respond to your questions.

[The prepared statement of Mr. Garrish follows:]

STATEMENT OF THEODORE J. GARRISH, NOMINEE FOR GENERAL COUNSEL, U.S. DEPARTMENT OF ENERGY

Mr. Chairman:

I appreciate the opportunity to appear today as President Reagan's nominee to be General Counsel of the Department of Energy.

INTRODUCTION

The General Counsel performs an extremely important role at the Department of Energy. As chief legal officer of the Department, the General Counsel provides critical advice to the Secretary and to each of the offices within the agency to assist them in carrying out their duties and responsibilities. Moreover, the General Counsel, like all attorneys for the Government, has the special responsibility to see that the laws of the United States are administered faithfully with openness and fairness to all of the American people. I shall attempt to fulfull these obligations to the best of my ability.

PERSONAL OBSERVATIONS AND BACKGROUND

As this Committee considers my confirmation, I would like to share with you some of my thoughts concerning the high honor the President has conferred upon be by submitting my name for this position.

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First, energy is a subject of personal interest to me. A rational energy policy is a significant component to the economic and strategic well-being of our country. Over the years, I have had experience in a number of energy issues. During my tenure as Legislative Counsel at the Department of the Interior, I was involved in numerous energy issues, including such things as oil shale and geothermal leasing. Similarly, during my service as Special Assistant to the Secretary of Energy, I have been involved in one of the issues which presently is before this Committee, the development of natural gas legislation. These are issues I thoroughly enjoy.

Second, I wish to continue to serve in this Administration. In doing so, I am particularly enthusiastic about working with the new Secretary of Energy -- Don Hodel. I have enormous admiration for his abilities as a manager and as a leader, having worked closely with him in the past. It will be professionally and personally rewarding to continue to work with him in this new capacity as his legal advisor.

QUALIFICATIONS TO SERVE AS GENERAL COUNSEL

A variety of different functions are housed within the Office of General Counsel, ranging from general legal counseling to litigation, and from enforcement and regulatory activities to legislation. In addition to possessing general management skills,

it would be important, in my view, for the DOE General Counsel to have a background in as many of these areas as possible.

I believe the experience I have gained in each of these areas during my career will be extremely helpful to me in handling the responsibilities I would assume upon confirmation. The most important of these qualifications are as follows:

General Counsel Activities - I served as General Counsel to the Consumer Product Safety Commission (CPSC), and in that capacity advised the Chairman and the Commissioners on the principal legal questions facing that agency. The issues before the Commission dealt with every imaginable question from legal interpretation of the agency's organic act to rulemaking, litigation, freedom-of-information requests, Privacy Act issues, the handling of proprietary data, procurement, personnel, conflicts of interest and numerous other issues. In many respects, the position of General Counsel at the Department of Energy involves similar types of legal questions -- questions which are unique to the Government.

Enforcement - At various times during my career, I have held positions which have involved supervision of and responsibility for implementation of federal regulatory enforcement programs. During the period I served as Director of Compliance (Solicitor-CPSC), I was responsible for managing the enforcement program of the agency. This involved the development and implementation of

enforcement strategies, including compliance audits, investigations and, where required, case preparation. My involvement in these activities led to the filing and prosecution of the Commission's first civil penalty cases relating to substantial product hazards. These were the first such cases successfully completed by the agency and served as a model for compliance activities of the Commission thereafter. During the development of these cases, I supervised the investigations into potential violations, personally served as hearing officer during document returns under subpoena, drafted enforcement materials, presented the cases to the Commission and, upon approval by the CPSC, filed the cases and pursued them successfully to completion.

Similarly, during my tenure at the Federal Trade Commission, I was responsible for the development and implementation of the Commission's enforcement program on advertising substantiation, directed against deceptive advertising. My responsibilities included conducting an extensive analysis of the past successes and failures of the program and developing recommendations for improvements to the program with a view toward increasing compliance. The Commission adopted the recommendations made to it, and the corresponding program was implemented.

Each of these practical experiences has provided me with useful background in the development of successful enforcement strategies, in the use of investigatory tools and in the overall handling of compliance issues. These are skills which will be

invaluable in addressing the enforcement questions faced by the General Counsel.

Litigation - Over a number of years, both as an attorney in private practice and as an attorney for the Federal Government, I have had significant litigation experience, particularly involving complicated cases, before both administrative bodies and the federal courts.

As a trial attorney with the Department of Justice, I supervised a team of litigators and personally tried cases in the United States District Courts and represented the Government in appearances before the U.S. Court of Appeals. These cases were complex and sensitive and involved significant constitutional issues.

As General Counsel and as Solicitor of CPSC, I was actively involved in litigation both administratively and before the federal courts. Most of these cases involved defense of agency rule-makings and enforcement actions seeking injunctive relief.

The litigation skills I have developed during my career as a lawyer will be extremely useful in supervising the Department's litigation in many critical areas, such as radiation liability, defense of agency regulations and numerous other subjects.

Regulation - While I served with the Solicitor's Office at at the Department of the Interior, I was actively involved in the development of numerous regulations. Similarly, during my tenure

at the CPSC, I supervised the development and promulgation of a large number of product safety regulations. This latter activity involved a complicated rulemaking system which was much more extensive than required by the Administrative Procedure Act and resulted in regulation based on extensive scientific data. I also supervised the development of most of the Commission's procedural regulations for the administrative adjudication of cases.

This experience with major regulatory efforts fully acquainted me with administrative procedures, standards for review and other aspects of rule-making, which will be helpful to me in the Department's regulatory efforts.

Legislation - While I served as Legislative Counsel for the Department of the Interior, I was involved in all aspects of the legislative process, including the drafting of testimony and legislative reports along with the actual preparation of legislation. I have continued these types of functions at the Department of Energy. My legislative background will be particularly useful at the Department of Energy since the same legislative responsibilities fall to the General Counsel.

Management - Most importantly, throughout the various experiences I have mentioned, I have had occasion to manage large legal staffs which were commonly involved in extensive, complicated projects. I believe I have developed the abilities

to motivate lawyers, to provide the supervision necessary to assure top-flight quality performance, and to instill throughout the organization the dedication to professionalism which is the sine qua non for success.

GOALS FOR THE OFFICE OF GENERAL COUNSEL

I am committed to perpetuating the high degree of professionalism which currently exists in the Office of General Counsel of DOE. Much of this professionalism is attributable to the fine leadership of Tenney Johnson, to whom all of us owe a debt of gratitude for his long and exemplary service to the Federal Government. I shall strive to produce nothing short of the highest quality legal product. The American people have a right to expect no less.

I intend to provide career development to all attorneys within the General Counsel's office by making certain that their service to the Government is both challenging and rewarding and by focusing special emphasis on training younger attorneys. It has been my observation that there is tremendous dedication and commitment among lawyers in federal service, and my limited acquaintanceship with the legal staff at DOE indicates no exception. I trust that my management style will inspire these qualities.

Among the goals I have set for the Office is the unqualified assurance that the public trust is executed faithfully and that

compliance and enforcement activities are implemented fully and vigorously pursued. The General Counsel has the singular responsibility to see to it that the legal advice rendered to the Secretary and to the other Department Officers, as well as the legal positions taken in administrative and judicial proceedings, properly reflect the legislative intentions of the Congress without regard to the political views or personal preferences of the General Counsel, the Secretary or the Administration. Secretary Hodel and I have discussed this particular matter, and I am pleased to report to you that he fully expects me to render legal advice on the basis of my best, professional judgement as to what the law is, not what he, I, or others might like it to be. To say the least, I am committed to that approach to the office both intellectually and philosophically.

I know from my experiences both in and out of Government that some lawyers, who may well be bright, conscientious and well-meaning, have a tendency upon occasion to cross that often hazy line between rendering legal advice and making substantive policy for the client. That happens not to be my view of the proper role for the General Counsel of a Federal department. There is quite enough to do if the General Counsel operates on the premise that the primary responsibility of his office is to act as a service organization for the Department. An organization that is responsible for seeing to it that the laws enacted by the Congress are interpreted properly, and the policies developed by the policy-makers within the Department are executed properly, insofar as doing so is within the province of the Office.

I look forward to the opportunity to serve with this Administration and to work cooperatively with the Congress in meeting our mutual objectives. I shall be pleased to respond to your questions.

The CHAIRMAN. Thank you very much, Mr. Garrish.

Mr. Warner?

Senator Warner. Mr. Chairman, I will pass. I have had the opportunity to question the witness.

The CHAIRMAN. Senator Hecht?

Senator Hecht. No questions, Mr. Chairman, I have had the opportunity to meet with him and I am very impressed with him.

The CHAIRMAN. Senator Jackson and Senator Johnston have some questions which they wish to submit for the record for your response for the record.

Mr. GARRISH. Very good. I will be happy to respond.

The CHAIRMAN. Without stressing the point unduly, the speed with which we can move to confirmation will be determined partly by the speed at which you get those answers back.

Mr. GARRISH. I understand.

The CHAIRMAN. Are there further questions or proceedings?

There are no further witnesses to be heard this morning. Thank you very much. I have no questions to ask at this time.

Mr. GARRISH. Thank you very much.

The CHAIRMAN. The committee stands adjourned.

[Whereupon, at 10:15 a.m., the committee was adjourned.]

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APPENDIXES

APPENDIX I

BIOGRAPHY AND INFORMATIONAL STATEMENT OF THEODORE J. GARRISH

Theodore J. Garrish was nominated to be General Counsel for the U.S. Department of Energy (DOE) on March 21, 1983. As DOE's General Counsel, Mr. Garrish would be responsible for the Department's legal programs and policies with the exception of those related to the Federal Energy Regulatory Commission, which maintains a separate legal staff.

Mr. Garrish is currently serving as Special Assistant to the Secretary of Energy with chief responsibility for coordination of the Department's efforts relative to natural gas.

Previously he was Legislative Counsel at the Department of the Interior in 1981-1982; partner in the Washington, D.C., law firm of Deane, Snowdon, Shutler, Garrish and Gherardi in 1978-1981; General Counsel at the U.S. Consumer Product Safety Commission in 1976-1978; Assistant to the Secretary of the Interior in 1976 and 1974-1975; Assistant to the Special Counsel, the White House in 1974; and Senior Trial Attorney and Chief of the Advertising Evaluation Section at the Federal Trade Commission in 1973-1974.

He received an A.B. degree from the University of Michigan in 1964 and a J.D. degree cum laude from Wayne State University in 1968. Mr. Garrish is a member of the Bar of the State of Michigan and of the District of Columbia.

A native of Lathrup Village, Oakland County, Michigan, he has two children and resides in Alexandria, Virginia.

UNITED STATES SENATE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

ROOM 3104 DIRKSEN BUILDING WASHINGTON, D.C. 20510
TELEPHONE 202-224-4971

INFORMATION

REQUESTED OF PRESIDENTIAL NOMINEES

The Rules of the U.S. Senate Committee on Energy and Natural Resources requires that each Presidential nominee considered by the Committee shall submit a financial statement sworn to by the nominee as to its completeness and accuracy. Under the rules all such statements must be made public by the Committee unless the Committee in executive session determines that special circumstances necessitate a full or partial exception to this requirement. The rules also provide that at any hearing to confirm a Presidential nomination, the testimony of the nominee and, at the request of any member, any other witness shall be under oath.

In order to assist the Committee in its consideration of nominations, each nominee is requested to complete the attached Statement For Completion By Presidential Nominees, and submit a completed copy of the Executive Personnel Financial Disclosure Report (SF 278).

The original and twenty (20) copies of the requested information should be made available to Honorable James A. McClure, Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C. 20510 (Attn: Staff Director) as soon as possible.

UNITED STATES SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

Name: Garrish (LAST) Theodore (FIRST) John (OTHER)

Position to which nominated: General Counsel - Department of Energy

Date of nomination: March 21, 1983

Date of birth: 6 (DAY) 1 (MONTH) 43 (YEAR)

Place of birth: Detroit, Michigan

Marital status: Divorced

Full name of spouse:

Name and ages of children: Theodore John Garrish, Jr. 14 years

Amelia Sutter Garrish 8 years

Education:

Institution	Dates attended	Degrees received	Dates of degrees
Wayne State University	1965-1968	J.D.	1968
University of Michigan	1960-1964	A.B.	1964

Employment record: List below all positions held since college, including the title and description of job, name of employer, location, and dates.

Special Assistant to the Secretary, U.S. Department of Energy, Washington, D. C. - 1982 to Present

Legislative Counsel, U.S. Department of the Interior, Washington, D.C. - 1981-82

Partner, Deane, Snowdon, Shutler, Garrish & Gherardi, Washington, D.C. - 1978-81

General Counsel (Solicitor), U.S. Consumer Product Safety Commission, Washington, D.C. - 1976-78

Assistant to the Secretary, U.S. Department of the Interior, Washington, D. C. - 1976

Deputy General Counsel, U.S. Office of Consumer Affairs, Washington, D.C. - 1975-76

Attorney Advisor, U.S. Department of the Interior, Washington, D.C. - 1974-75

Staff Assistant to the President, The White House, Washington, D.C. - 1974

Employment record—Continued

Senior Trial Attorney, Federal Trade Commission, Washington, D.C. - 1973-74

Public Opinion Analyst, Committee for Re-election of the President, Washington, D. C. - 1972

Supervisory Trial Attorney, U.S. Department of Justice, Washington, D.C. - 1969-72

Assistant Manager, Consumer Research, American Motors Corporation, Detroit, Michigan - 1968-69

Military service: Enter all military service if not included above: service, dates, rank, type of discharge.

None

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Law School -- Cum laude Degree

-- Moot Court Board

-- Scholarship

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations.

Organization	Office held (if any)	Dates
Michigan State Bar Association	-	1969 to Present
District of Columbia Bar Assoc.	-	1972 to Present
Federal Bar Association	-	1971 to Present
American Bar Association	-	1971 - 1981
National Lawyers Club	-	1979 - 1981
U.S. Ski Association (SkiPac)	Treasurer	1979 - 1980
Peninsular Society (Alpha Delta Phi social fraternity)	-	1960 to Present
Delta Theta Phi Professional fraternity	-	1965 - 1969

Published writings: List the titles, publishers and dates of any books, articles, or reports you have written.

During 1978-80 I submitted monthly columns entitled, "Legislative and Regulatory Report" and "Washington Report" along with news releases and short articles to newsletters and specialized publications with an interest in land use issues. Because of the myriad of publications in which such columns appeared it would be exceptionally difficult to provide a listing of where items appeared.

Qualifications: State fully your qualifications to serve in the position to which you have been named.
(attach sheet)

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

I am currently employed by the Department of Energy. All previous connections have been severed.

2. As far as can be foreseen, state whether you have any plans after completing government service to resume employment, affiliation or practice with your current or any previous employer, business firm, association or organization.

I have no such plans.

3. Has anybody made you a commitment to a job after you leave government?

No.

4. (a) If you have been appointed for a fixed term, do you expect to serve the full term?

Not applicable.

(b) If you have been appointed for an indefinite term, do you have any known limitations on your willingness or ability to serve for the foreseeable future?

No.

Potential conflicts of interest:

1. Describe any financial arrangements or deferred compensation agreements or other continuing dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None; however, certain unpaid legal fees (discussed in the attachment to question #2, page 6) remain outstanding and if collected may be considered deferred compensation.

2. List any investments, obligations, liabilities, or other relationships which might involve potential conflicts of interest with the position to which you have been nominated.

The uncertainty of collection of certain unpaid legal fees by my former law firm (see attachment to question #2, page 6) could create a contingent liability for me to my former firm.

3. Describe any business relationship, dealing or financial transaction (other than tax-paying) which you have had during the last 10 years with the Federal Government, whether for yourself or relatives, on behalf of a client, or acting as an agent, that might in any way constitute or result in a possible conflict of interest with the position to which you have been nominated.

None.

4. List and describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation at the national level of government or for the purpose of affecting the administration and execution of national law or public policy.

While in private practice (1978-1980) I performed legislative advocacy and representation on various national resource issues. Principal among these were the Archaeological Resource Protection Act and RARE II bills. I registered and reported this activity with the appropriate offices of the House and Senate on behalf of my law firm.

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

I will undertake not to participate as a government official in any matters in which my former law firm is involved. Further, I will not participate in any particular matter, the outcome of which could have a direct and predictable effect on either the National Outdoor Coalition or the Cellulose Manufacturers Association.

6. Explain how you will comply with conflict of interest laws and regulations applicable to the position for which you have been nominated. Attach a statement from the appropriate agency official indicating what those laws and regulations are and how you will comply with them.

Same as #5 above.

Department of Energy
Washington, D.C. 20585

FEB 01 1983

David Scott, Acting Director
Office of Government Ethics
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Dear Mr. Scott:

This letter transmits to you, in accordance with 5 C.F.R. §734.604(c)(2)(iii), a copy of the Standard Form 278, "Financial Disclosure Report," filed by Theodore J. Garrish incident to his proposed nomination as General Counsel, Department of Energy.

Mr. Garrish indicated on Schedules A and D of his report that, although he withdrew from the law firm of Deane, Snowdon, Shutler, Garrish and Gherardi upon entering Government service in 1981, his capital account with the firm has not yet been settled. In that connection, the firm is still receiving payments from the National Outdoor Coalition and the Cellulose Manufacturers' Association of fees owed for legal services performed by Mr. Garrish while he was a member of the firm.

To avoid any suggestion of conflict of interest, Mr. Garrish has undertaken, for the duration of his service with the Department, not to participate, as a Government employee, in any particular matter in which his former law firm (now known as Deane, Snowdon, Shutler and Gherardi) is involved. Further, he has agreed not to participate, as a Government employee, in any particular matter the outcome of which could have a direct and predictable effect on either the National Outdoor Coalition or the Cellulose Manufacturers' Association, so long as that organization still owes fees to Mr. Garrish's former law firm for his legal services.

I have certified on the report that the information contained therein discloses no conflict of interest under applicable laws and regulations. I encountered no problems in reaching the conclusions upon which this certification is based other than as described above.

Sincerely,

Ralph D. Goldenberg

Ralph D. Goldenberg
Assistant General Counsel
for Standards of Conduct

Enclosure

bcc: Theodore Garrish

Financial statement:

1. Attach a copy of your Executive Personnel Financial Disclosure Report (SF 278).

2. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services and firm memberships or from former employers, clients, and customers. Amounts should be indicated by the categories established for reporting income on Form SF 278, Schedule A.

See answer on attached sheet.

3. Are any assets pledged? (Add schedule.)

None other than real estate holdings in 1607 Associates.

4. Are you currently a party to any legal action?

No.

5. Have you ever declared bankruptcy?

No.

6. Have you filed a Federal income tax return for each of the last 10 years? If not, please explain.

Yes.

7. Has the Internal Revenue Service ever audited your Federal tax return? If so, what resulted from the audit?

Yes. Approved as originally submitted.

Theodore J. Garrish

Page 4, "Qualifications"

During my legal career, I have held numerous positions with the Federal Government and have acquired a variety of legal skills and qualifications which have helped prepare me to serve as General Counsel of the Department of Energy. The most important of these qualifications are as follows:

General Counsel activities--I served as General Counsel to the Consumer Product Safety Commission where I advised the Commission on all legal questions facing the agency.

Enforcement--As Director of Compliance (Solicitor-CPSC), I supervised all enforcement operations of the Commission which included development of enforcement strategies, case preparation, and compliance audits and inspections. This included preparation of the Commission's first civil penalty actions for violations of substantial hazard regulations.

As Chief of Advertising Evaluation at the Federal Trade Commission, I was responsible for an extensive analysis of past enforcement programs in advertising and development of recommendations for improving the program and increasing compliance with the law.

Litigation--As General Counsel and Solicitor of CPSC, I was actively involved in Commission litigation both administratively and before all U.S. Courts.

As a trial attorney with the Department of Justice, I supervised a five state litigation team and personally tried cases in Federal District Court and the U.S. Court of Appeals.

In other positions with the Department of the Interior, the Federal Trade Commission and the Special Counsel's Office of the White House, I have been involved in all aspects of litigation and case preparation.

Regulation Development--Serving as attorney with the Department of the Interior, I was involved with regulation development, and later when I served with the Consumer Product Safety Commission I supervised both the development and promulgation of rules and regulations involving numerous product safety hazards and of the Commission's procedural regulations.

Legislation--As Legislative Counsel at the Department of the Interior, I was involved in all aspects of the legislative process including development of the Administration's position on various bills, preparation of testimony and legislative drafting. Similarly at the Department of Energy, I have been extensively involved in development of the Administration's proposal on natural gas.

Throughout these experiences, I have had the opportunity to manage large legal staffs working to achieve the goals and objectives of the various agencies I have served. If confirmed, each of these experiences will provide important background for service as General Counsel of the Department of Energy.

Theodore J. Garrish

Page 6, "Financial Statement," answer to Question #2

The National Outdoor Coalition and the Cellulose Manufacturers Association were clients for whom I performed legal services while a member of the law firm of Deane, Snowdon, Shutler, Garrish and Gherardi, which I left on entering government serivce in 1981. I have not been associated with this law firm, and have performed no legal services for these clients, since that time. At the time I left the law firm, however, fees were owing to this firm in connection with services I had performed for these clients, payments for which are still being received by the firm. However, as my former firm receives payment for unpaid bills, income will be attributed to me for income tax purposes. No cash has been distributed to me nor is any expected to be distributed in the future since the monies received at the time of withdrawal approximated the amounts expected to be collected on these accounts in the future. Non-payment of fees by these clients could result in a contingent liability to my former firm.

AFFIDAVIT

District of Columbia ss

Theodore J. Garrish , being duly sworn, hereby states that he/she has read and signed the foregoing Statement for Completion by Presidential Nominees including the Financial Statement and that the information provided therein is, to the best of his/her knowledge and belief, current, accurate, and complete.

Subscribe and sworn before me this 11th day of April 19 83

Notary Public

My Commission Expires Nov. 14, 1984

United States of America
Office of Government Ethics

Office of Personnel Management
Washington, D.C. 20415

MAR 25 1983

Honorable James A. McClure
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Theodore J. Garrish, who has been nominated by President Reagan for the position of General Counsel, Department of Energy.

We have reviewed the report and have also obtained advice from the Department of Energy concerning any possible conflict in light of the Department's functions and the nominee's proposed duties. Based thereon, we believe that Mr. Garrish is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

David R. Scott
Acting Director

Enclosure

SF 278 (Rev 6 '1)
FPM Chapter 7 1
U.S. Office of Personnel Management

FINANCIAL DISCLOSURE REPORT

Form Approved
OMB No 3150-0060

Reporting Status (Check Appropriate Box)			NOTE
[x] Incumbent	[x] New Entrant, Nominee, or Candidate	[ ] Termination Report	All schedules must be filed. Enter "None" in areas or across schedules where appropriate.

Agency Use Only	OGE Use Only
Date of Filing (Month, Day, Year): JAN 26 1983	

	Last Name	First Name and Middle Initial	Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.)	Termination Date (If Applicable) (Month, Day, Year)
Reporting Individual's Name	Garrish	Theodore J.		
Position for Which Filing	Title of Position: General Counsel	Department or Agency (If Applicable): U.S. Department of Energy		
Location of Present Office	Address (Number, Street, City, State and Zip Code): 1000 Independence Ave., S.W.; Washington, D.C. 20585		Room Number: 7B-222	Telephone No. (Include Area Code): (202) 252-5270

Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination	Do You Intend to Create a Qualified Diversified Trust?
	Committee on Energy and Natural Resources	[ ] Yes [ ] Not necessary [x] No

Position(s) Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held
	Special Assistant to the Secretary of Energy - From November 10, 1982 to Present Legislative Counsel for the Department of Interior - From March 1981 to November 10, 1982

Certification	Signature of Reporting Individual	Date (Month, Day, Year)
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.	T. Garrish	1-5-83

Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official	Date (Month, Day, Year)
The information contained in this report discloses no conflict of interest under applicable laws and regulations.	Roger B. Zimmerman	2/1/83
Office of Government Ethics Use Only ➤	Signature	Date (Month, Day, Year)

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

Mr. Garrish has undertaken, for the duration of his service with the Department, not to participate as a Government employee in any particular matter in which his former law firm is involved. Further, he has agreed not to participate as a Government employee in any particular matter the outcome of which could have a direct and predictable effect on either the National Outdoor Coalition or the Gillnetters Manufacturers' Association, so long as that organization still owes fees to Mr. Garrish's former law firm for his legal services. RJZ 2/1/83

(Check box if comments ...)

7/83 Edition of ... 278 is Usable

278-107

INCOME AND INTERESTS IN PROPERTY

This schedule is applicable in the case of all reporting individuals

	Yes	No
Do you, your spouse, or dependent child receive income from, or have a beneficial interest in a trust?		X
If "yes", have you reported the income from the trust?	N/A	
If "yes", have you reported the assets of the trust?	N/A	
If "yes", is this trust an "excepted" trust? N/A or "qualified" trust?	N/A	

	Yes	No
Are there any interests in property, purchases, sales, or exchanges, or liabilities of a spouse or dependent child which you have not reported?		X
If "Yes," do you certify to all of the following? 1. They represent solely your spouse's or dependent child's financial interest or responsibility; 2. They are not, in any way, past or present, derived from your income, assets, or activities; 3. You neither derive, nor expect to derive, any financial or economic benefit from them; and 4. You do not have knowledge as to the composition of such interest or liabilities.	N/A	

Page Number 2 — Schedule A

Reporting Individual's Name: Theodore J. Garrish

Agency Use Only

Date of Filing (Month, Day, Year): JAN 26 1983

Source (S) or Dependent Child (DC)	Identification	Income: Type of Income (✓) Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify)	Income: Category of Amount or Value (✓) None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount / Only if "Other" Specified	Date (Mo., Day, Yr.) / Only if Honoraria	Interests in Property: Valuation of Assets (✓) Valuation Method	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	$250,001-$500,000	$500,001-$1,000,000	Over $1,000,000
	1607 Associates (D.C. partnership owning commercial real estate at 1607 New Hampshire)		X										X				(Gross; net loss)		A						X	
	National Outdoor Coalition*							Legal fees*									7,124*		A		X					
	CELLULOSE MANUFACTURERS ASSOC.																		A		X					

AMOUNTS OF FEES STILL OWING

* The National Outdoor Coalition was a client for whom I performed legal services while a member of the law firm of Deane, Snowdon, Shuttler, Garrish and Gherardi, which I left on entering Government service in 1981. I have not been associated with this law firm, and have performed no legal services for this client, since that time. At the time I left the law firm, however, fees were owing to this firm in connection with services I had performed for this client, payments for which are still being received by the firm. A portion of the amounts paid is credited to my remaining capital account balance at the law firm. The amounts reported above are the portion of such payments so credited during 1982. CELLULOSE MANUFACTURERS ASSOC. ALSO A FORMER CLIENT FROM WHOM FEES STILL OWING.

2/4/83

SF 278—Financial Disclosure Report
(Rev. 6/91)

PURCHASES, SALES, AND EXCHANGES

This schedule is applicable only in the case of annual and termination reports.

Page Number	3	Schedule B
Reporting Individual's Name: Theodore J. Garrish		
Agency Use Only		
Date Received (Month, Day, Year): JAN 26 1983		

Report Applicable Transactions, Even if Also Reported on Schedule A

S or DC	Identification of Property (real and personal)	Type of Transaction			Date (Month, Day, Year)		Category of Amount or Value (x)					
		Purchase	Sale	Exchange	Purchase	Sale or Exchange	$1,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	$250,001 to $500,000	Over $500,000
	None											

SF 278—Executive Departure Report
(Rev. 6/91)

GIFTS AND REIMBURSEMENTS

This schedule is applicable only in the case of annual and termination reports.

Page Number	4	Schedule C

Reporting Individual's Name: Theodore J. Garrish

Agency Use Only

Date (Month, Day, Year): JAN 26 1983

I. Lodging, Transportation, Food and Entertainment—*List each source totaling $250 or more in value*

Date	Source (Name and Address)	Brief Description	Value
	None		

II—All Other Gifts—*List each source totaling $100 or more in value*

Date	Source (Name and Address)	Brief Description	Value
	None		

III. Reimbursements—*List each source totaling $250 or more in value*

Date	Source (Name and Address)	Brief Description	Value
	None		

SF 278—Financial Disclosure Report (Rev. 6-81)

This schedule, except as noted for the third section, is applicable in the case of all reporting individuals.

Reporting Individual's Name: Theodore J. Garrish

Agency Use Only — Date (Month, Day, Year): JAN 26 1983

Page Number: 5

Schedule D

LIABILITIES

S or DC	Name and Address of Creditor	Type of Liability (e.g., promissory note, margin account) Give date, interest rate and, if applicable, term	Category of Amount or Value: $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
	Midland Insurance, Chicago, Illinois	Promissory Note from 1607 Associates - Sept. 1980 - 12%, 10 years. Total liability of all partners, $750,000; my share, $107,111				X	
	First American National Bank, Washington, D.C. (Line of Credit for 1607 Associates)	2 pts. above prime - 1 year Revolving. Total liability of all partners, $75,000; my share, $5,355 (originated January, 1980 Ext. 1/27)	[Under $10,000]				

POSITIONS HELD

Name and Address of Organization	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
1607 Associates 1607 New Hampshire Washington, D.C.	Real estate partnership	Partner	Jan. 1980	present

COMPENSATION IN EXCESS OF $5,000 PAID BY ONE SOURCE

This section is applicable only in the case of nominees and new entrants.

Source (Name and Address)	Brief Description of Duties
National Outdoor Coalition	Former client from whom former law firm receives fees for services previously performed. See note on Schedule A.

RELATIONS WITH OTHER EMPLOYERS

Description of Terms of Any Agreement or Arrangement	Parties	Date (Mo., Day, Yr.)
Withdrawal from former law firm (Deane, Snowdon, Shutler, Garrish and Gherardi) has been effectuated. However, as my former firm receives payment for unpaid bills, income will be attributed to me for income tax purposes. No cash has been distributed to me nor is any expected to be distributed in the future since the monies received at the time of withdrawal approximated the amounts expected to be collected on these accounts in the future. See note on Schedule A.		

APPENDIX II

RESPONSES TO ADDITIONAL QUESTIONS

THEODORE J. GARRISH

1770 Preston Road
Alexandria, Virginia
22302

May 2, 1983

Honorable James A. McClure
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the answers to the questions received during my April 25, 1983 confirmation hearing.

Sincerely,

Theodore J. Garrish

SENATOR JACKSON

Question 1: On March 8, 1983, Secretary Hodel transmitted to Senator Jackson a copy of a memorandum for the Secretary from the General Counsel entitled, "Minimum Required Rate of Fill of the Strategic Petroleum Reserve (SPR)." In that opinion the General Counsel implied that the current Administration's SPR fill rate is not necessarily in compliance with the Energy Emergency Preparedness Act. Have you reviewed this memorandum of the former General Counsel? Is there anything in it with which you disagree?

In your opinion, if the General Counsel renders an intepretation of the law that is at odds with OMB's interpretation of that law, should the Secretary in carrying out his oath of office abide by the General Counsel's interpretation or by that of OMB? Do you think that DOE's current SPR fill rate policy of 220,000 b/d in FY 1983 is in compliance with the mandated fill rates as specified in EEPA?

Answer: I have examined the memorandum to Secretary Hodel from General Counsel Tenney Johnson regarding the minimum required rate of fill of the Strategic Petroleum Reserve. The memorandum addresses an exceedingly complex relationship among several statutes. At its heart is the conclusion that the minimum fill rate imposed by law for fiscal year 1983 is the highest practicable rate which can be achieved by utilizing all available appropriations, including those appropriated for fiscal years before 1983, after allowing for a carry-forward into fiscal year 1984 of funds to sustain purchases for the first six months of fiscal year 1984, even if the resulting fiscal year 1983 rate exceeds 220 thousand barrels per day. I agree with this conclusion.

In those rare instances in which a Secretary is confronted by differing interpretations of a statute for which he has a

responsibility to implement, he must arrive at his own best judgment based upon all of the information available to him; however, he ultimately would be guided by the opinion of the Attorney General who serves as the senior legal officer for the Administration.

SENATOR JACKSON

Question 2: The FY 1983 Continuing Resolution contains an amendment which Senator Warner sponsored which provides for the disbursement to the States of $200 million in oil price overcharge escrow funds resulting from settlements between the DOE and oil companies. These monies are applied to State Grant Programs in Conservation and low-income energy assistance. To what extent do you think the Warner provision should be used as a model for disbursing the proceeds of other settlements in oil price overcharge cases? Do you think the approach of the Warner provision is a good one that DOE should recommend be used in the future?

Answer: I am generally familiar with the amendment contained in the fiscal year 1983 Continuing Resolution sponsored by Senator Warner that directed disbursement of up to $200 million in escrow funds to the states to augment several federal low income assistance and energy conservation programs.

Current law requires that the Department first seek to identify and make restitution to parties and entities that sustained the economic injuries associated with alleged overcharges. Where it is not possible to identify the individuals so injured, I believe the Warner provision is one of several appropriate remedies for substantially the reasons relied upon by Judge Flannery in his opinion in United States v. Exxon, C.A. No. 78-1035 (D.D.C. March 25, 1983). The Warner provision is a good model and may very well be useful in the future.

20-567 O—83——6

SENATOR JACKSON

Question 3: On more than one occasion, DOE personnel from the Office of the General Counsel have told Committee staff that they do not consider report language contained either in a legislative report of this Committee or in a conference report to be binding on the Department in carrying out the laws adopted by this Committee and the Congress. What is your view on this subject? In what instances generally is such report language binding on the Department and in what instances generally is it not binding?

Answer: My understanding of the law on this subject is as follows. The starting point for construing a statute is the words Congress enacted in the statute itself. Train v. Colorado Pub. Int. Res. Group, 426 U.S. 1, 9-10 (1976). Report language as part of legislative history may be used: (a) to interpret and clarify statutory language, or to resolve ambiguities; and (b) to avoid absurd results which flow from a literal reading of the statute. United States v. American Trkng. Assns., 310 U.S. 534, 543-544 (1940). Legislative history itself, no matter how clear, is not itself legislation. Train v. City of New York, 420 U.S. 35, 45 (1975). Accord, LTV Aerospace Corp., 55 Comp. Gen. 307, 319 (1975); B-206940.2, 61 Comp. Gen. ____ (1982). See also TVA v. Hill, 437 U.S. 153, 190 (1978). Therefore, legislative history is not binding if it contradicts the clear meaning of the words of a statute; otherwise, as a practical matter, I have found that Executive agencies, give considerable weight to legislative history in interpreting the meaning of statutory provisions.

SENATOR JOHNSTON

Question 1: It is my understanding that oil companies were given oral, rather than written, notice that they need not continue to collect FRS data.

(a) Is this true?

(b) (If "yes") Why did EIA not give written notice to the oil companies?

(c) Is it the practice of EIA to give oral notice to oil companies that they need not participate in a statutorily required program?

(d) If you are confirmed as General Counsel, what will be your advice regarding this sort of practice?

Answer: I have been advised by EIA that oil companies were given oral rather than written notice in this instance. EIA has further advised that it does not have a standard policy and practice in this area, but that it has in the past frequently communicated with oil companies using informal oral notifications. If confirmed as General Counsel, I would advise that future notifications with respect to DOE regulatory requirements be made in writing and, where appropriate, published in the Federal Register.

In view of the issues which have arisen in regard to this matter, it is my intention to inform the Administrator of EIA of my views immediately following my confirmation.

SENATOR JOHNSTON

Question 2: Are you aware of any DOE internal documents regarding the decision to terminate the FRS program? Please supply a copy of any such document to the Committee.

Answer: I am not personally aware of nor familiar with any DOE internal documents regarding a policy decision to propose termination of the FRS program. I have delivered a copy of this question to the Administrator of the Energy Information Administration and have requested him to provide the Committee copies of any such documents.

SENATOR JOHNSTON

Question 3: (a) Please advise the Committee whether there are discretionary programs within EIA that could have been curtailed instead of terminating FRS.

(b) (If "yes") Why are those programs not scheduled to be curtailed before FRS is terminated?

(c) Do you agree that, as a matter of law, an agency head faced with a tight budget must curtail discretionary programs prior to curtailing statutorily required programs?

Answer: I am not sufficiently familiar with the entirety of EIA's programs to have formed a judgment as to whether sufficient discretionary functions are continuing that might have been curtailed in order to fund the FRS. I agree that an agency head confronted with a tight budget resulting from appropriations made by the Congress may be required to terminate certain clearly discretionary activities before suspending activities required by a particular statute. A difficulty exists, however, in determining which are statutorily required. Required programs may be created by a variety of means other than a single specific mandate. For instance, organic acts which spell out certain purposes and responsibilities, so-called "core functions," for an agency in general terms may also be considered to have certain mandatory aspects. Accordingly, determining which programs must be curtailed first in light of limited funding should be addressed on a case-by-case basis.

SENATOR JOHNSTON

Question 4: (a) In your opinion, which branch of government is charged with the responsibility for establishing the appropriate level of funding for a particular governmental program, the Congress or the Executive Branch?

(b) If the Executive Branch believes that an inadequate amount of money has been appropriated for a particular program, don't you agree that the proper response is to ask Congress either for a supplemental appropriation or statutory termination of the program?

Answer: Establishment of the appropriate level of funding necessarily involves both the Legislative and Executive Branches. Congress sets the level in the first instance and may provide specific guidance on funding various "programs" in the appropriations bill itself. The Executive is then responsible to approve or disapprove such legislation. A single appropriation may cover a variety of areas which may be regarded as programs. In such case, the Executive Branch must administratively allocate funds consistent with Congressional directive as there may be.

If the amount ultimately appropriated is believed to be inadequate, the Executive Branch may either ask for a supplemental appropriation, manage the program as best it can with the limited funds, or if it believes that the program is impossible to perform with limited funds, ask the Congress for statutory termination of the program.

SENATOR JOHNSTON

Question 5: (a) Have you had an opportunity to review the written opinion of Acting General Counsel Eric J. Fygi regarding Administrator Evered's decision to terminate the FRS program?

(b) (If "yes") Do you agree with Mr. Fygi's legal opinion?

(c) Please provide the Committee with your own legal analysis of the Secretary's options in dealing with the FRS program.

Answer: I have reviewed the memorandum prepared by the Acting General Counsel regarding Administrator Evered's decision to terminate the FRS program. That memorandum concluded that the appropriation in question did not repeal by implication the statutory provisions under which the FRS was established, but also concluded that an agency head confronted by an appropriation inadequate to carry out all activities provided for by permanent law may look to the legislative history of the current year's appropriation in deciding how to deal with such a situation. As a matter of law, I agree with both propositions.

The Acting General Counsel's memorandum did not indicate that the particular method chosen by Administrator Evered was the only course of action available to him. Nor did it examine the factual and program premises on which the decision was based.

I am not yet sufficiently familiar with the details of the factual and judgmental issues involved in this matter to be able now to provide the Committee with an authoritative opinion on the subject, nor to indicate fully the options available. However, I have discussed this matter with the Secretary, and he has indicated a willingness to re-examine this issue. If confirmed, you may be assured that I will give this matter my thorough personal attention,

will regard it as a matter of high priority in view of the concerns expressed by Committee members, and would have no objection to making available to the Committee any additional legal analysis that may be necessary during this reexamination.

SENATOR JOHNSTON

Question 6: On April 6, Secretary of Energy Hodel was asked about the Department's plans to terminate FRS at a luncheon at the National Press Club. His response was as follows:

"My understanding is that the view and the position of the Department is that the Congress not having funded that activity (the FRS) we are not required to collect that information."

Do you believe that Congress has not funded the FRS program? Explain your reasoning.

Is it up to Congress to list all the statutorily required programs it intends to be carried out when appropriations are made? How often is this done as a matter of practice?

Would your counsel to the Secretary be that he is now not required to collect the information referred to in section 205(h)(4)? Please elaborate in detail.

Answer: I believe the question of whether the Congress has funded the FRS program necessarily is intertwined with the factual and judgmental issues that I have mentioned above. There is, of course, no obligation on the Congress to enumerate those statutorily-required functions that it intends to be carried out or otherwise affected by an appropriation. In my experience, however, Congress frequently employs the appropriation process to provide guidance to Executive agencies as to the Congress' expectations in using an appropriation.

The Secretary's willingness to reconsider this matter is consistent with my counsel. Should I be confirmed as General Counsel, you may be assured that the advice I ultimately render on this subject reflects a thorough examination of all the facts that bear upon this issue.

SENATOR JOHNSTON

Question 7: Please provide your analysis of the circumstances, if any, under which the Secretary of Energy is permitted to withhold or delay transmission to Congress of information in the possession of the Secretary.

Answer: I believe that the Congress should have the fullest access to documents and information in the custody of the Department of Energy to permit the Congress to examine the Department's execution of laws, as well as to familiarize the Congress with actual experience in implementing laws such that the Congress might most knowledgeably carry out its legislative functions. I would not counsel that the Secretary ever lightly dispute such access with a jurisdictional Committee of the Congress. Only in circumstances raising the most serious questions involving separation of powers under the Constitution, or contravention of statutes enacted by the Congress, should the Executive decline promptly to make available to Committees of the Congress documents in its custody.

SENATOR JOHNSTON

Question 8: The disposition of funds collected by the Federal government from firms alleged to have overcharged consumers under the price control regime of the Emergency Petroleum Allocation Act of 1973 has been the matter of some controversy between the Department and Congress for several years. Presently it appears that a considerable sum of money will come into the Department's control by virtue of overcharge settlements and court decisions. Please review the issue of the possible uses of these funds and provide the Committee with a legal memorandum on the authority of the Secretary to dispose of money collected for overcharges under the EPAA regulations.

Answer: My understanding of the law on this subject is that the Department has an obligation to use its remedial powers to direct restitution to the individuals and entities that were harmed by the economic effects of petroleum regulation violations. When the character of a particular violation and its factual setting are such as not to permit such identification of injured parties, then I believe current law provides the Department broad authority to do the best it can "to set things right," as it was put by the Temporary Emergency Court of Appeals. Sauder v. Department of Energy, 648 F.2d 1341, 1348-9, (TECA 1981).

In January 1983, the Economic Regulatory Administration prepared a briefing paper which included a legal discussion of the authority of the Secretary to dispose of money collected for overcharges under EPAA regulations. A copy of this paper is attached. Subsequent to the completion of this paper, Judge Flannery issued his recent decision in United States v. Exxon, C.A. No. 78-1035 (D.D.C. March 25, 1983) (Mem. Op.) which also dealt with this issue. Specifically, pages 77 to 85 (attached) of that decision further amplify the discussion contained in the ERA paper.

A BRIEFING PAPER ON THE SOURCES OF THE DEPARTMENT OF ENERGY'S REMEDIAL AUTHORITY

Office of the Solicitor
Economic Regulatory Administration

January 19, 1983

I. INTRODUCTION

The Department of Energy ("DOE") possesses broad authority for enforcement of the Mandatory Petroleum Price and Allocation Regulations and for the implementation of various remedial measures to ensure compliance with and address violations of these regulations. The DOE derives this authority from statutory provisions enacted by Congress from 1970 through 1977. In turn, the agency has promulgated regulations to effectuate this statutory mandate and in particular, to carry out a policy of restitution to require persons who may have violated the regulations to disgorge their "ill-gotten gains" or to remit funds to those persons who may have been injured, or both. The courts have confirmed the agency's broad statutory mandate and its remedial efforts.

This memorandum will discuss the major statutory sources of DOE's authority for remedying violations of DOE regulations, the regulatory framework for implementing these activities and judicial decisions construing the scope and nature of DOE's authority. The memorandum will also briefly outline the provisions of the supplementary remedial authority granted to the DOE by Section 155 of the 1983 Further Continuing Appropriations Act. An appendix is attached which contains the statutory provisions, Executive Orders and regulations discussed herein.

II. STATUTORY AUTHORITY

The Economic Stabilization Act of 1970 ("ESA"), as amended, 12 U.S.C. §1904 note, the Emergency Petroleum Allocation Act of

1973 ("EPAA"), 15 U.S.C. §751 et.seq., the Federal Energy Administration Act of 1974 ("FEAA"), 15 U.S.C. §761 et.seq., and the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. §7101 et. seq., provide the basic statutory authority for the Department of Energy's broad remedial authority and its use in devising appropriate remedies for violations of DOE regulations.

A. The Economic Stabilization Act

Congress adopted the Economic Stabilization Act of 1970, as amended, in response to mounting inflation throughout the economy. Section 203(a) of the ESA, as amended, authorized the President to "issue such orders and regulations as he deems appropriate to . . . stablize prices, rents, wages, and salaries . . ." (emphasis added) and to provide "for the establishment of priorities of use and for the systematic allocation of supplies of petroleum products including crude oil . . ." The President delegated to the Cost of Living Council the authority to enforce wage and price controls adopted pursuant to the ESA. Executive Order 11615, reprinted in 1971 U.S. Code Cong. and Admin. News 2575. To insure maximum flexibility in the exercise of this executive authority, Congress excluded the functions exercised under the ESA from the operation of the Administrative Procedure Act, 5 U.S.C. §551 et. seq. (except as to certain requirements which are inapplicable here). ESA, Section 207, 12 U.S.C. §1904 note.

Under Section 209 of the ESA, any person authorized by the President to exercise authority under the ESA may request the

Attorney General to bring an action in district court to enjoin acts or practices in violation of orders or regulations issued under the ESA. In addition to injunctive relief, the district courts were given the power to order restitution of moneys received in violation of any such order or regulation. Congress also granted private parties "suffering legal wrong because of any act or practice arising out of the [ESA], or any order or regulation issued pursuant thereto", the right to bring an action in district court for declaratory judgment, injunctive relief or damages. ESA, Section 210(a).

Congress further provided that the district courts would have exclusive original jurisdiction over cases or controversies arising under the ESA, including the authority to review orders or regulations issued thereunder. ESA, Section 211. Decisions of district courts in these cases, wherever situated, were reviewable on an expedited basis by a special court of appeals, the Temporary Emergency Court of Appeals, created by Section 211(b) of the ESA.

Thus, the ESA provided for both administrative and judicial enforcement of regulations adopted pursuant to the Act, and provided for private enforcement of the Act's regulations and orders as well. Judicial review of such orders and regulations was available in the district courts, with subsequent appellate review in a single court of appeals, thereby promoting both speed and consistency of appellate decisions.

B. The Emergency Petroleum Allocation Act

When the Arab oil embargo caused the prices of imported crude oil to rise dramatically, Congress adopted the Emergency Petroleum Allocation Act in order to confer upon the President broad authority to regulate the petroleum industry and provide for the allocation of crude oil and refined petroleum products. The President was directed to exercise "specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system." EPAA, Section 2(b), 15 U.S.C. §751(b)(Supp. III 1973).

In order to carry out this authority, the President was required to promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil and each refined petroleum product and at prices specified in such regulations. EPAA, Section 4(a), 15 U.S.C. §753(a). The regulation authorized by Section 4(a) of the EPAA was to accomplish, to the maximum extent practicable:

> (A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;
> (B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);
> (C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of -

(i) fuels, and

(ii) minerals essential to the requirements of the United States, and for required transportation related thereto:

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

EPAA, Section 4(b)(1), 15 U.S.C. §753(b)

The Congress also provided that the enforcement and judicial review functions established by the ESA would be made applicable to the regulation adopted pursuant to Section 4(a) of the EPAA and orders or regulations issued pursuant thereto. EPAA, Section 5(a)(1), 15 U.S.C. §754(a)(1).

It was the express intent of Congress that the President be granted "full flexibility in devising the most effective and efficient means of meeting the priority needs of the American people identified in section 4(b)." Joint Explanatory Statement of the Conference Committee, Conf. Rep. 93-628, U.S. Code Cong. & Ad. News, 93d Cong., 1st Sess., at 2689 (1973). Further, the Congress recognized the need for broad administrative flexibility in establishing details of allocation and price controls:

> [T]he Committee has attempted to state in clear terms what it believes should be accomplished under a mandatory allocation program but has, we believe, been careful to provide the President with adequate flexibility so that he is not straight-jacketed into accomplishing these objectives where it would be inimicable to the public interest.

Id. at 2688.

Furthermore, the qualifying language in Section 4(b)(1), "to the maximum extent practicable" was Congress' recognition of the necessity for a "balancing" approach to achieve maximization of the legislative goals. See, e.g., Id. at 2688, 2689. Additionally, the conferees noted, it may be impossible to satisfy one objective without sacrificing the accomplishment of another. Id. at 2688. Clearly though, the President was given the discretion to exercise these choices, the flexibility to further the statute's objectives and the authority to require remedies to accomplish these objectives.

C. The Federal Energy Administration Act

In 1974, Congress adopted the Federal Energy Administration Act, providing for the establishment of the Federal Energy Administration ("FEA"), an independent agency within the Executive Branch. 15 U.S.C. §761, et. seq.. All functions of the Cost of Living Council ("CLC") relating to or utilized by the Energy Division of the CLC were transferred to the Administrator of FEA. FEAA, §6(b), 15 U.S.C. §765(b). Further, The President delegated his authority under the ESA and EPAA to the FEA Administrator. Executive Order 11790, 39 Fed. Reg. 23785 (June 27, 1974).

In addition to authorizing the transfer of energy-related functions to the Administrator of FEA, the Federal Energy Administration Act directed him to accomplish other objectives in carrying out these functions, including the responsibility to "promote stability in energy prices to the consumers, . . . [and] prevent unreasonable profits within various segments of the energy industry." FEAA, §5(b)(5), 15 U.S.C. §764(b)(5).

D. The Department Of Energy Organization Act

The Department of Energy Organization Act ("DOEOA"), adopted in 1977, established the Department of Energy and vested in the Secretary of Energy all of the functions that were formerly vested by law in the Administrator of the Federal Energy Administration. DOEOA, §301, 42 U.S.C. §7151. Congress also made clear that orders relating to functions transferred under the DOEOA regulations would remain in effect until changed or modified by the Secretary, DOEOA, §705, 42 U.S.C. §7295; and further, that the DOEOA in no way terminated or limited the functions or authority of the President under other energy-related acts or his authority to delegate such functions. DOEOA, §708, 42 U.S.C. §7298. In sum, the previously described authority under the ESA and EPAA was continued and transferred to the Secretary of Energy. See Executive Order 11790, supra, as amended by Executive Order 12038, 43 Fed. Reg. 4957 (February 7, 1978).

The Secretary is authorized by Section 644 of the DOEOA, 42 U.S.C. §7254, to "prescribe such procedural and administrative rules and regulations as may be deemed necessary or appropriate

to administer the functions now or hereinafter vested in him" and is authorized by Section 642 of the DOEOA, 42, U.S.C. §7252, to delegate his functions to officers or employees of the Department of Energy.

Section 503(a) of the DOEOA, 42 U.S.C. 7193 authorizes the Secretary of Energy to issue a remedial order to any person violating the Mandatory Petroleum Price and Allocation Regulations. Subsection (b) of the same section provides that such an order shall be deemed a final order, unreviewable by any court or agency unless the person notifies the Secretary that he intends to contest it within thirty days. Subsection (c) provides for review of the remedial order by the Federal Energy Regulatory Commission should the recipient decide to contest it. 42 U.S.C. §7193(a)-(c). Commission orders issued pursuant to §503 of the DOEOA constitute final agency action and are reviewable in the United States District Courts.

E. Section 155 Of The 1983 Further Continuing Appropriations Act, "The Warner Amendment"

The recently enacted Section 155 of the 1983 Further Continuing Appropriations Act, Public Law No. 97-377, the "Warner Amendment", provides the DOE with specific statutory authority to distribute to the States up to $200 million of the $550 million DOE holds in escrow accounts as of December 17, 1982. Excluded from consideration are funds which are not likely to be necessary for satisfying claims in proceedings initiated before the Office of Hearings and Appeals prior to December 17, 1982 or identified in judicial litigation prior to that date. This authority, which

is in addition to the foregoing statutory authority, directs the Secretary of Energy to determine which funds now held in escrow are not likely to otherwise be refunded to injured persons because the purchasers cannot be reasonably identified or paid or because the amount of each purchaser's overcharge is too small to be capable of reasonable determination.

Once identified, the escrow funds of up to $200 million are to be distributed to the States for use as if they had been received pursuant to one or more of five enumerated energy conservation programs:

> (1) the program under part A of the Energy Conservation in Existing Buildings Act of 1976, 42 U.S.C. §§6861 et seq.;
>
> (2) the programs under part D of Title III of the Energy Policy and Conservation Act (relating to primary and supplemental state energy conservation programs), 42 U.S.C. §§6321 et seq.;
>
> (3) the program under part G of Title III of the Energy Policy and Conservation Act (relating to energy conservation for schools and hospitals), 42 U.S.C. §§6371 et seq.;
>
> (4) programs under the National Energy Extension Service Act, 42 U.S.C. §§7001 et seq.; and
>
> (5) the program under the Low Income Home Energy Assistance Act of 1981, 42 U.S.C. §§8621 et seq.

Used in this manner, the escrow funds distributed under the Warner Amendment will accomplish indirect restitution in which a class or classes of persons who may have been injured are benefited. This type of remedial action is fully consistent with and complementary to the agency's existing authority.

III. REGULATORY AUTHORITY

Pursuant to the statutory authority found in the EPAA, FEAA and DOEOA, the Department of Energy and its predecessor agencies promulgated substantive pricing and allocation regulations and procedural regulations governing the initiation and prosecution of administrative enforcement actions.

A. Administrative Enforcement Procedures

Subpart O of Part 205 of the DOE regulations sets forth the agency procedures for the enforcement of the price and allocation regulations, the resolution of administrative enforcement proceedings and the fashioning of appropriate remedial relief at the conclusion of such proceedings. The enforcement process may be initiated by the issuance of a Notice of Probable Violation (NOPV) when the DOE's Economic Regulatory Administration (ERA) "has reason to believe that a violation [of the pricing regulations] has occurred, is continuing or is about to occur," 10 C.F.R. §205.191(a) or by the issuance of a Proposed Remedial Order (PRO) where the ERA finds, that a violation "has occurred, is continuing, or is about to occur . . ." 10 C.F.R. §205.192(a). Upon issuance of the PRO, ". . . the ERA shall promptly publish a notice in the Federal Register which states the person to whom the Proposed Remedial Order is directed . . ." and shall send copies of the Federal Register announcement to all "readily identifiable persons who are likely to be aggrieved by the issuance

of the Proposed Remedial Order as a final order." 10 C.F.R. §205.192(c). Any aggrieved person may file a Notice of Objection within 15 days of the notice in the Federal Register. 10 C.F.R. §205.193(a). If the PRO is not contested, the ERA may request the Office of Hearings and Appeals (OHA) to issue the PRO as a final Remedial Order (RO). 10 C.F.R. §205.193(e). If the PRO is contested, however, the enforcement process proceeds to the next stage.

The next stage is an adversary, trial-type adjudicatory proceeding before OHA. 10 C.F.R. §205.193. At the conclusion of the proceeding before OHA, the office determines whether to issue a RO. 10 C.F.R. §205.199(B)(a). The RO "may adopt the findings and conclusions contained in the Proposed Remedial Order or may modify or rescind any such finding on the basis of a determination that the finding or conclusion is erroneous in fact or law or is arbitrary and capricious." Id. The order must "state the relevant facts and legal bases supporting the determination." Id. Following its issuance, the RO may be appealed first to the Federal Energy Regulatory Commission which may affirm, modify or vacate the RO and then to Federal District Court. 1/ If no appeal is taken to FERC within 30 days, the Remedial Order becomes a final order of DOE. The regulations thus establish an adjudicatory procedure where there is a final legal determination concerning an overcharge or other violation of DOE regulations. See 10 C.F.R. §205.199C.

1/ If the Remedial Order is based upon an NOPV issued prior to October 1977, it may be appealed directly to district court without FERC review. DOEOA, §503(f), 42 U.S.C. §7193.

B. Consent Order Regulations

In addition to the regulatory procedures for a remedial order, Subpart O provides wide latitude for the use of settlements in resolving compliance matters arising under DOE regulations. The DOE "may at any time resolve an outstanding compliance investigation or proceeding . . .with a consent order." 10 C.F.R. §205.199J(a). Such authority exists "notwithstanding any other provisions" of Subpart O. Id. Moreover, "[a] consent order need not constitute an admission by any person that DOE regulations have been violated, nor need it constitute a finding by the DOE that such person has violated DOE regulations." Id. It need only "set forth the relevant facts which form the basis for the [Consent] order." Id.

Notice of a consent order involving an amount in excess of $500,000 must be published in the Federal Register and a public comment period of not less than 30 days must be provided before such order may be finalized. 10 C.F.R. §205.199J(c). Comments received by the DOE are to be considered in the process of deciding whether the consent order shall be finalized as proposed or withdrawn or modified. After the expiration of the comment period, "[t]he DOE may withdraw its agreement to the consent order, attempt to negotiate a modification of the consent order or issue the consent order as signed." Id.

Furthermore, the consent order is a final order "having the same force and effect as a Remedial Order." 10 C.F.R. §205.199J(b).

The order is not "appealable pursuant to the provisions of §205.199(c) or §205.199D and Subpart H and shall contain an express waiver of such appeal or judicial review rights as might otherwise attach to a final order of the DOE." Id.

Thus, the regulations afford the public a right to comment on the DOE's consent order where the sum is in excess of $500,000. The DOE, however, has the broad authority consistent with its statutes, to determine when to resolve an enforcement proceeding by entering into a consent order, the terms of that order and whether to modify the order after the comment period.

C. Remedies

The Subpart O regulations provide that the DOE may impose remedies for violations found by Remedial Orders or for alleged violations resolved by consent orders. The remedies are broad and flexible, and not limited solely to refunds for overcharges.

> A Remedial Order. . . , or a Consent Order may require the person to whom it is directed to roll back prices to make refunds equal to the amount (plus interest) charged in excess of those amounts permitted under DOE Regulations, to make appropriate compensation to third persons for administrative expenses of effectuating appropriate remedies, and to take such other action as the DOE determines is necessary to eliminate or to compensate for the effects of violation . . .

10 C.F.R. §205.199I(a). Further,

> In cases where purchasers cannot be reasonably identified or paid or where the amount of each purchaser's overcharge is incapable of reasonable determination, the DOE may refund the amounts received in such cases directly to the Treasury of the United States on behalf of such purchasers.

Id.

Even though a consent order has the same force and effect as a remedial order (See 10 C.F.R. §205.199J(b)), there are important distinctions between the two. A remedial order is the product of an adversarial process and contains specific findings that violations of the price and allocation regulations have resulted in an ascertainable overcharge to injured parties. A consent order, however, is a product of a settlement agreement between the violator and the DOE and contains no determination of overcharges because the consent order terminates the agency's enforcement efforts prior to such a final determination by OHA or the courts. 2/ Because consent orders do not usually involve a determination that a violation has occurred or that a specific party has been injured, the broad authority to devise flexible and appropriate remedies is an essential component of the consent order process.

D. Subpart V Procedures

In 1979, the agency formally adopted Subpart V -- the Special Refund Procedures -- a discretionary procedural framework for determining how to distribute certain funds collected by DOE's

2/ The consent order need only "set forth the relevant facts which form the basis for the [consent] order." 10 C.F.R. §205.199J(a). A remedial order, however, must "state the relevant facts and legal bases supporting the determination." 10 C.F.R. §205.199B(a). This distinction, as discussed previously, is reflected in Section 205.199J(a), which provides that consent orders need not contain an admission by the person to whom it is issued that the regulations have been violated, nor a finding that the person violated the regulations.

enforcement arm pursuant to remedial or consent orders. 44 Fed. Reg. 8562 (February 9, 1979). See Subpart V to 10 C.F.R. Part 205. The purpose of these procedures is to allow OHA, in specific circumstances, to determine an appropriate disposition of funds remitted by a person to DOE's Economic Regulatory Administration pursuant to a final remedial or consent order when the DOE is unable to readily ascertain the persons who may have been overcharged or the exact amounts of such overcharges. 44 Fed. Reg. 8562 (February 9, 1979).

The Subpart V proceedings may be initiated only upon the filing of a Petition by a DOE enforcment official with OHA. The regulations, whose invocation is discretionary, provide that a DOE official "may" file a Petition for the Implementation of Special Refund Procedures before OHA if he

> has been unable readily either to identify the persons who are entitled to refunds to be remitted pursuant to a Remedial Order or a Consent Order or to ascertain the amounts of refunds that such persons are entitled to receive.

10 C.F.R. §205.281(a), (b).

After considering the Petition, OHA issues a proposed decision which describes the nature of the particular refund proceeding and the standards OHA intends to apply in distributing the funds. 10 C.F.R. §205.282(a). The requirements for those standards are found in 10 C.F.R. §282(c):

> [T]he Office of Hearings and Appeals shall take into account the desirability of distributing the refunds in an efficient, effective and equitable manner and resolving to the maximum extent practicable all outstanding claims. In order to do so, the standards for evaluation of individual claims may be based upon appropriate presumptions.

A notice of the proposed decision is to be published in the Federal Register. 10 C.F.R. §205.282(b). After at least a 30-day period for public comment, OHA may issue a final order governing the distribution of refunds, pursuant to which any person found to be entitled to a refund may seek recovery. After refunds have been distributed to successful applicants, the regulations provide that any remaining funds

> shall be deposited in the United States Treasury or distributed in any other manner specified in the Decision and Order referred to in Section 205.282(c).

10 C.F.R. §205.287(c). Thus, OHA is vested with the discretion to dispose of any remaining funds as it deems most appropriate.

IV. JUDICIAL CONSTRUCTION OF THE DEPARTMENT OF ENERGY'S AUTHORITY

Judicial decisions strongly support the proposition that DOE has broad remedial authority and wide discretion in devising remedies which will best effectuate the purposes of its statutes.

A. The Agency's Broad Statutory Authority

TECA has repeatedly measured the breadth of the agency's (and its predecessors') power by the broad purposes of the congressional mandate in the ESA and the EPAA. In University of Southern California v. Cost of Living Council, 472 F.2d 1065 (TECA 1972), TECA found that the ESA conferred on CLC "the broadest of delegations of authority, delegation that carried with it the power to 'take such. . . actions as [the CLC] determines to be

necessary and appropriate to carry out the purposes of the [Executive] Order'" Id. at 1070. Thus TECA affirmed that CLC, in furtherance of its power to stabilize prices, possessed the power to order refunds of overcharges on football tickets, since the court was "faced with no clear showing that the Order denies such power and faced with the broad grant of authority to the agencies under which such a power can be readily implied." Id. See also, De Rieux v. Five Smiths, 499 F.2d 1321, 1329 (TECA) cert. den. 95 S. Ct. 176 (1974) ("It is no abdication of our constitutional role for this court to recognize the breadth of the delegations involved in the particular statute [ESA]. . . ."). TECA similarly found that the EPAA contained an extremely broad delegation of authority by Congress to the Executive branch in Pasco, Inc. v. Federal Energy Administration, 525 F.2d 1391, 1394 n.6 (TECA 1975). See also, Mobil Oil Corp. v. Federal Energy Administration, 566 F.2d 87, 93-95 (TECA 1977) and cases cited therein.

In examining the provisions of the EPAA, TECA has recognized that "the exercising of the administrative authority and the accomplishment of purposes enumerated by Congress under the recognized emergency conditions are exceedingly complicated undertakings," Condor Operating Co. v. Sawhill, 514 F.2d 351, 359 (TECA), cert. den., 421 U.S. 976 (1975), and has held that Congress intended the agency to have considerable flexibility in its accomplishment of the nine objectives of the Act, Basin, Inc. v. Federal Energy Administration, 552 F.2d 931, 935 (TECA 1977). TECA has further explained that:

> The order of the objectives was not intended to establish any priority, nor was it believed that the objectives were all mutually attainable. This Court has previously recognized that none of the nine objectives of the Act should be elevated to the level of a mandatory duty and that the balancing of all objectives is required to effectuate maximum achievement of their competing interests.

Pasco, Inc., supra at 1379. The Pasco Court quoted the Conference Committees' view that "'these [sic] are collective goals, and the conferees have not attempted to discern an order of precedence or value one against another. It is fully recognized that, in some instances, it may be impossible to satisfy one objective without sacrificing the accomplishment of another.' H.R. Conf. Rep. No. 93-628, U.S. Code Cong & Ad. News, 93d Cong., 1st Sess. p. 2688 (1973)." 525 F.2d at 1397. In Pasco, TECA also noted with approval the California district court's 1974 decision in Union Oil Co. v. F.E.A., which held that because the goals of the EPAA are "inherently inconsistent" and could not be furthered simultaneously, "a balancing of goals is required, and Congress has left the details of this balancing to the Federal Energy Administration." Id. See also, General Crude Oil Co. v. Department of Energy, 585 F.2d 508, 515-16 (TECA 1978).

Thus, in Marathon Oil Co. v. Federal Energy Administration, 547 F.2d 1140 (TECA 1976), TECA found that in furtherance of these goals explicit powers did not need to be spelled out in the statute and that the agency had implied power under its broad grant of authority to use its best judgment to "promulgate regulations to achieve the broad objectives enumerated in the Act." Id. at 1146. See also, Consumers Union of U.S., Inc. v. Sawhill, Appendix, 525 F.2d 1068, 1072 (TECA 1975) (In setting broad

objectives in the EPAA, Congress intended to provide broad regulatory discretion and "to hew a sphere of responsibility within which FEA could decide how to proceed against the crisis"); Mobil Oil Corp. v. Federal Energy Administration, 556 F.2d 87, 97 (TECA 1977) (Comprehensive purposes of EPAA implies broad powers and administrative flexibility).

B. Discretion In Fashioning Remedies

1. General Remedial Authority

TECA has construed this broad and flexible mandate of statutory authority to allow the agency considerable discretion in the selection of appropriate remedies. 3/ In Condor Operating Co. v. Sawhill, 514 F.2d 351 (TECA), cert, den. 421 U.S. 976 (1975), TECA rejected an oil producer's fifth amendment challenge to the supplier-purchaser subsection of the regulations, stating:

> Where the obvious intent of Congress is to give the President and his delegates broad power to do what reasonably is necessary to accomplish legitimate purposes rendered necessary by a recognized emergency, and regulations are fashioned to implement the Congressional mandate, the Court should not interfere with the prerogative of the agency

3/ The Supreme Court also gave a broad construction to the remedial authority contained in the ESA's predecessor, the Emergency Price Control Act of 1941, finding statutory silence concerning remedies to be permissive rather than limiting. In Porter v. Warner Holding Co., 328 U.S. 395 (1946), the Court found that although the Act specified certain remedies and was silent on restitution, it was appropriate under the "other order" language of §205(a) (which in all other respects is identical to §209 of ESA) for the Court to grant restitution. The Porter Court found such a broad construction of the Act to be "consistent with the statutory language and policy, the legislative background and the public interest." Id. at 103.

> to select the remedy which for rational reasons is deemed most appropriate.

Id. at 359. 4/

Finally, in Bonray Oil Co. v. DOE, 472 F. Supp. 899 (W.D. Okla. 1978), aff'd per curiam, 601 F.2d 1191 (TECA 1979), TECA stated that where the agency is neither authorized nor forbidden from taking particular remedial action, the court must look to the agency's statutory scheme and purpose in order to test the agency's authority to undertake such action. Id. at 903. Thus, TECA found that the Economic Stabilization Act did not, by implication, forbid the agency rather than a court from ordering a refund, holding that the Department's remedial authority is to be measured by the "broad purposes of the Congressional mandate in both the ESA and EPAA." Id. at 904.

2. Restitutionary Authority

Both the agency and the courts possess the power to "set things right" and to order restitution in situations involving

4/ Numerous cases also emphasize the discretion to be accorded DOE as the agency with the expertise in handling complex economic problems under the ESA and EPAA and the difficulty of courts second-guessing the agency. See University of Southern California, supra at 1068-69; Plumbers Local Union No. 519 v. Construction Industry Stabilization Committee, 479 F.2d 1052, 1056 (TECA 1973) ("This court has repeatedly held that great deference should be given to the expertise of economic stabilization agencies"); Condor, supra at 359; Powerine Oil Co. v. Federal Energy Administration, 536 F.2d 378, 385-6; (TECA 1976); Basin, supra at 934-5; General Crude Oil Co. v. Department of Energy, 585 F.2d 508, 515 (TECA 1978).

overcharging by persons subject to the Department's regulations. Sauder v. DOE, 648 F.2d 1341, 1348-49 (TECA 1980). Restitution, however, is not a damage remedy, [5] but instead is for the purpose of "disgorg(ing) ill-gotten gains or to restore the status quo or to accomplish both objectives" Id. (emphasis in original). TECA has further held that in authorizing the agency to obtain restitution, Congress did not intend "to limit the power of the courts or the agency to restitution or to a particularly strict interpretation of restitution." Id.

The recent TECA decision in Citronelle-Mobile Gathering Co. v. Edwards, 648 F.2d 717 (TECA 1982), does not retreat from these basic principles. The Citronelle court did refuse to order payments into the Treasury, in the first instance, requiring the Department to attempt to identify injured parties and make refunds

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5/ Indeed, the purpose of the administrative remedies authorized by the ESA

> ' . . .is to ensure, on a national scale the enforcement of [the DOE's administrative] regulations. A complainant is technically not a party either to an administrative investigation or to a subsequent enforcement action, and any compensation that a complainant may receive through the issuance of a remedial order is simply a by-product of the agency's effort to re-establish compliance with its regulatory scheme.

Bulzan v. Atlantic Richfield Co., 620 F.2d 278, 282 (TECA 1980). In contrast, Section 210 of the ESA provides the proper route for a private party who wishes to be redressed for an injury suffered because of a violation of the regulations, since DOE's administrative remedies "are not concerned either with punishing a violator for his illegal conduct or with compensating a victim for his injuries." Id. See also Dyke v. Gulf Oil Corp., 601 F.2d 557, 567 (TECA 1979) (Congress provided separate public and private remedies under ESA).

to those parties as identified. However, the logic of the decision is that monies which could not be so distributed, as a practical matter, would have to be distributed by some alternative equitable mechanism. Id. at 727. Furthermore, the court reached the conclusion that DOE should attempt to make refunds to identifiable overcharged parties only after upholding the district court's determination that a violation of DOE regulations had occurred. Id. at 721. Significantly, consent orders do not constitute a finding of violation, nor do they represent an admission of wrongdoing by the party signing the order. Hence, there is no determination that DOE regulations have been violated from which would flow the obligation to identify overcharged parties and refund them monies obtained from the wrongdoer.

Additionally, unlike the situation in Citronelle, settlements do not necessarily resolve only discrete issues where the alleged victims can be readily identified. Many of the "global" consent orders cover the entire range of the Department's regulations, involving potentially millions of customers, most of whom cannot be readily identified, nor can an amount of injury be easily attributed to them. In these circumstances, the Department has devised various remedies, including payments to the Treasury and the states which insure that monies are disgorged from alleged violators and which provide an indirect benefit to members of the public who may have been affected by a company's alleged violations. Such remedial actions are fully consistent with the principles of restitution and the courts' interpretations of DOE's remedial authority.

This position has recently been upheld by the Delaware district court in Pennzoil Co. v. Department of Energy, C.A. No. 78335 (D. Del. Jan 4, 1983). In that case, DOE entered into and filed with the court a stipulated settlement which called for the entry of a consent judgment with Pennzoil in which the company agreed to refund $14.7 million to the miscellaneous receipts of the U. S. Treasury in full payment of adjudicated overcharges. Cities Service Company sought to intervene to challenge the settlement, arguing that as a first purchaser from Pennzoil it was entitled to some portion of the refunds. The Delaware court dismissed Cities' motion to intervene, finding that Cities as a nonparty had no interest in the proceeding and, if it had a cause of action against Pennzoil, should proceed under Section 210. The court approved the settlement, holding that

> a settlement which requires an alleged violator of the Mandatory Petroleum Pricing Regulations to disgorge what the DOE believes to be overcharges to the United States Treasury, with the consent of the alleged violator and without effect upon the rights of any who may have borne the burden of the overcharges, is not illegal and is within the authority of the DOE

Slip op. at 12. 6/

6/ Although the General Accounting Office has issued an opinion stating that the DOE's remedial flexibility is limited to the initiation of Subpart V proceedings before OHA when it cannot directly identify overcharged parties (B200170, October 10, 1980), the above-discussed TECA decisions offer strong support for the DOE's broad discretion to structure appropriate remedies. Furthermore, GAO opinions are not binding on the Executive Branch.

C. Consent Order Decisions

The district courts have almost uniformly refused to entertain nonparty challenges to DOE consent orders, 7/ generally granting the DOE's motion to dismiss on one (or both) of two grounds: prosecutorial discretion or lack of standing.

In three cases involving challenges to DOE consent orders, Federal courts have declined to review such orders, finding that DOE's decision to enter into a consent order is a matter that Congress committed to the agency's discretion and is consequently unreviewable. In Consumer Energy Council of America v. Duncan, 4 CCH Energy Mgmt. ¶26,314 (D.D.C. 1981), the court concluded:

> ...[T]he Department of Energy's entry of consent orders falls entirely within the Agency's prosecutorial discretion, and is exempt from judicial review.

In U.S. Oil Co. v. DOE, 510 F. Supp. 910 (E.D. Wisc. 1981), the court held that it lacked subject matter jurisdiction to review the substance of a consent order. Finally, in Go-Tane Service Stations v. DOE, 4 CCH Energy Mgmt. ¶26,313 (N.D. Ill. 1981), the court declined to review a consent order on the ground that it is an action committed to agency discretion.

The majority of challenges to the remedial provisions of DOE consent orders have been dismissed for lack of standing. The

7/ See discussion of S.O.S. Gasoline v. DOE, 4(CCH) Energy Mgt. ¶26,321(D.D.C. 1981) and Minnesota v. Standard Oil, 516 F. Supp. 682 (D. Minn 1981), infra at 27 n. 8, 28 n.9.

courts have found that the distribution scheme, whether or not it accords anything to plaintiff, does not deprive plaintiff of any legal right or interest since he has a private damage action under Section 210 and a consent order merely confers upon the recipient an additional and gratuitous benefit which did not previously exist. For the above reasons, the court in U.S. Oil Co. v. Department of Energy, supra, held that plaintiffs, various purchasers of petroleum products sold by Koch Industries, Inc., did not have standing to challenge a consent order entered into by Koch Industries, Inc. and DOE. The court found that the consent order, rather than resulting in any injury to the plaintiffs, merely provided a potential fortuitous benefit to the plaintiffs. The court thus stated:

> The remedial measures set forth in the proposed consent order represent a fortuitous benefit to the plaintiffs, not an injury. Therefore, with respect to count two of plaintiffs' complaint, the Court finds that plaintiffs lack standing because they have shown no injury to themselves.

510 F. Supp. at 913.

This decision has also been followed in Town & Country Markets, Inc. v. DOE, C.A. No. 3178 (D.D.C. Sept. 23, 1981), appeal voluntarily withdrawn, No. DC-87 (TECA January 22, 1982). Plaintiff, a customer of OKC Trading Company, a firm which had entered into a consent order with the DOE, claimed that the consent order was invalid for a number of reasons. After noting that "a consent order is an alternative method for relief which supplements plaintiff's private right of action...," the court found that plaintiff had

not incurred the requisite injury in fact to give rise to standing. Slip op. at 3. "The distribution of consent order funds represents a benefit to its recipients, and any alleged inadequacy in the nature or quality of their recovery is not an injury." Slip op. at 4. See also Consumer Energy Council v. Duncan, supra, and Kern County Refinery, Inc. v. Tenneco Oil Co. & DOE, CV-81 3253 LEW (KX) (C.D. Cal. March 1, 1982) (third party challenge to DOE consent order dismissed from the bench because plaintiff lacked standing to sue). Most recently, the court in The Transportation Group v. DOE, 4 (CCH) Energy Mgt. ¶26,413 (D.D.C. Mar. 18, 1982), dismissed a challenge to a consent order's remedial provisions where the challenged provision provided for payment to the states.

> Plaintiffs allege that a provision of the Consent Order which provided that Chevron distribute $25 million to states in which Chevron marketed refined petroleum products to fund energy related programs renders the Consent Order invalid because the Consent Order does not contain a provision providing for refunds to direct purchasers of Chevron such as the plaintiffs.
>
> After consideration of the pleadings and memoranda filed by the parties. . . . the Court being fully advised in the premises, it is the Court's determination that the Complaint should be dismissed because plaintiffs, who are not parties and for whom Congress provided a private right of action by which to seek redress from Chevron for alleged overcharges, lack standing to challenge the Chevron Consent Order.

Id.

A number of these recent district court decisions also explicitly support the DOE's exercise of discretion in fashioning appropriate remedies. In S.O.S. Gasoline v. DOE, 4 (CCH) Energy

Mgt. ¶26,321 (D.D.C. 1981), the court dismissed a third party challenge to the Getty Consent Order, recognizing the discretionary nature of DOE's restitutionary authority:

> It is clear that plaintiff does not have a right to any certain sum nor can it dictate how restitution shall be accomplished. Restitution is never an exact science, and the Department's pass-through and refund procedures evince an awareness of the difficulties both in allocating refunds to first level purchasers like S.O.S. as against ultimate consumers and in identifying the consumers for a given producer's goods. It is not for a court to determine the appropriate refund for any given purchaser, only the department has the expertise to execute that task properly . . . .

Id. at 28,460 (emphasis in original). 8/

The discretionary nature of DOE's restitutionary obligation was also upheld in Consumer Energy Council of America v. Duncan, supra. The court held that DOE has the expertise needed to make the proper determination as to distribution of consent order funds, despite plaintiff's allegations that the agency had entered into consent orders which did not accord restitution to the actual overcharged parties. ¶26,314 at 28,418.

Similarly, in Minnesota v. Standard Oil, 516 F. Supp. 682 (D. Minn. 1981), the court upheld the DOE's decision in the

8/ Although Judge Gesell dismissed SOS's request for payment of a specific sum of money and injunctive relief, he indicated that under the "appropriate circumstances" a third party to a consent order would have standing to challenge that order. Such "appropriate circumstances" were based upon the court's determination that SOS was arguably injured by DOE's "refusal to implement any plan for disbursement of the Getty funds," id. at 28,459 (emphasis in original) not from "an entitlement to any given restitutionary award from funds obtained through a government enforcement action ...." Id. Because DOE has implemented plans for disbursement of consent order funds the "appropriate circumstances" found by the SOS court do not exist here.

Standard consent order to utilize remedies other than restitution to overcharged parties, finding that under the broad Congressional mandate contained in the ESA and EPAA, Section 209 does not operate as a limitation on the agency's remedial authority. Id. at 692. 9/

V. CONCLUSION

It is clear from the language of the relevant statutes and their legislative history, the regulations promulgated pursuant to those statutes, and the TECA and district court decisions construing those statutes and regulations that DOE has the broad discretion and flexible remedial authority to devise remedies which the agency determines will best carry out the purposes of its statutes. So long as the distribution of funds collected pursuant to settlements effectuates a valid statutory purpose and does not contravene the regulations or case law discussed above, the distribution is within the agency's authority and consistent with its overall mandate.

9/ In that case the court, after conducting a limited review of the terms of a DOE consent order including alleged nonrestitutionary remedies to determine if they were in excess of DOE's authority, found that they were not and dismissed counts II, III and IV of Minnesota's complaint against DOE pursuant to Fed. R. Civ. P. 12(b)(6) and 56 for failure to state a cause of action.

generally limited to the refiner's May 15, 1973 price plus, among other costs, the increased cost of crude oil. 10 C.F.R. §212.83(c)(2)(iii). Similar pass-through provisions for increased costs also applied to crude oil resellers, product resellers and retailers. See 10 C.F.R. Part 212, Subparts F and L. As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges were not, as it simplistically asserts, borne by Exxon itself, but instead were borne by ultimate consumers of petroleum products throughout the entire country.[56]

The broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each. Yet this court is still faced with the task of fashioning an equitable remedy. The DOE suggests that, because ultimately all consumers suffered as a result of the overcharges, it would be most appropriate for the court to order payment into the Treasury of the United States government, the representative of all citizens. Exxon argues that the statute allows only reimbursement of the first purchasers of the overpriced crude oil, and then only after the DOE identifies the victims of the overcharges and proves the specific damages suffered by each. In any event, Exxon continues, under Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F.2d 717 (Em. App. 1982), payment to the

United States Treasury may not be considered restitution.

As noted above, Section 209 of the Economic Stabilization Act empowers the court to require restitution of funds obtained in violation of the oil price regulations. The scope of the court's power is much broader than Exxon allows. To begin with, the remedy of restitution is fundamentally different from the remedy of damages. In Sauder v. DOE, supra, 648 F.2d 1341, Sauder argued that the DOE, in seeking to impose upon him alone responsibility for all overcharges, had tried to read into the statute a damages remedy not within the common law concept of restitution. In rejecting Sauder's argument, the TECA distinguished restitution from damages, writing: "'In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge illgotten gains or to restore the status quo or to accomplish both objectives.'" Id. at 1348, quoting 5 Moore's Federal Practice ¶ 38.24[2], 38-195 (2d ed. 1981) (emphasis added). The agency, the court continued, "does not seek to recover Mobil's damages, which may or may not be the amount of the overcharges." 648 F.2d at 1348. The TECA stated the difference even more bluntly in Citronelle-Mobile Gathering, Inc. v. Edwards, supra, 669 F.2d 717:

> The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched and then to make him disgorge that amount. No proof is required that the plaintiff was damaged, much less the amount of any damage.

Id. at 722 (emphasis added). Accordingly, the DOE need not

attempt the impossible task of proving the identity and particular damages of each victim of the Hawkins Field overcharges in order for this court to order restitution.

As explained above, prior to decontrol in January 1981 DOE controlled the price of oil at every stage of production. In those circumstances, if a court ordered restitution of overcharges to the first purchaser of crude oil, that reimbursement would eventually be passed along to the ultimate consumer of petroleum products. See Grigsby v. DOE, 4 Energy Mgt. (CCH) ¶ 26,378 at 28,841 (W.D. La. 1982). Since decontrol, however, there has existed no ready method of ensuring that overcharges will be refunded to their ultimate victims, the consumer. To order a refund to the first purchaser would simply result in a windfall gain for that purchaser -- ironically, in this case, Exxon itself -- who would be under no obligation to pass the refund along.

Exxon maintains nevertheless that it is beyond the equitable powers of this court to order payment into the United States Treasury and bases its argument on Citronelle-Mobile Gathering, Inc. v. Edwards, supra, 669 F.2d 717. In that case two domestic crude oil resellers sold crude oil to PETCO, the wholly-owned foreign subsidiary of an American corporation, NEPCO. The oil was refined in the Bahamas by BARCO, a subsidiary of PETCO, and then shipped to NEPCO in the United States. NEPCO in turn sold the refined products to utilities and institutions on the east coast. The sellers claimed the first sales were export sales,

exempt from price controls. The district court denied the sellers' claims and held them in violation of the price ceilings. The government asked that the overcharges be paid into an escrow account for subsequent distribution to NEPCO customers. Instead, the district court sua sponte ordered restitution to the United States Treasury. The TECA affirmed, except as to remedy, holding that "payment to the United States Treasury is not restitution in the true sense of the word, or in the objectives of the statutes involved." 669 F.2d at 722.

Careful reading of the TECA decision reveals, however, that the court's modification of the district court's remedy was not a blanket prohibition on the ordering of restitution to the Treasury. The district court, TECA explained, shaped its remedy under the mistaken impression that the ultimate overcharge victims were undeterminable millions of individuals along the east coast. The TECA found, however, that "the sale of the over-priced oil was made to determinable utilities and other institutions along the Atlantic seaboard." 669 F.2d at 722. Having demonstrated injury to an identifiable class of persons, the government had a duty to try to ascertain those overcharged and to make restitution to them, with interest, from the restitution funds. Id at 723. To accomplish that end, the TECA remanded to the district court with instructions to order the violators to make restitution to the Treasury, but under special order of the court directing the Treasury to hold the funds in an

escrow account for subsequent distribution, at DOE's direction, to NEPCO customers. Id.

The TECA's refusal in Citronelle to allow unconditional payment into the Treasury was clearly based on the facts in that case which permitted identification of the victims of the overcharges.57/ The four shipments which were the subject of inquiry in Citronelle all occurred within the six months ending in late May 1974, before implementation of the Entitlements Program. See Citronelle-Mobile Gathering, Inc. v. O'Leary, 499 F.Supp. 871, 874-75 (S.D. Ala. 1980), aff'd sub nom.Citronelle-Mobile Gathering, Inc. v. Edwards, supra, 669 F.2d 717. Consequently NEPCO's customers alone bore the entire burden of the overcharges. DOE could measure their losses accurately and direct appropriate payment to them from the escrow fund suggested by the TECA.

Exxon's Hawkins Field overcharges, on the other hand, were diffused throughout the country. Creation of an escrow fund would serve no purpose. Monies in such a fund would languish there indefinitely, because DOE could never accurately determine the losses suffered by any one claimant. Thus, the facts which required the court in Citronelle to order actual reimbursement of overcharges are not present here, and this court is not precluded on the facts before it from ordering Exxon to make restitution to the Treasury.

A district court, sitting as a court of equity, unless applicable statutes provide otherwise, has "'all the inherent equitable power of the District Court . . . available for the proper and complete exercise of that jurisdiction'; and has power 'to do equity and mould each decree to the necessities of the particular case.'" Citronelle-Mobile Gathering, Inc. v. Edwards, supra, 669 F.2d at 722, quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). The applicable statutes here do not limit this court's equitable powers. Sauder v. DOE, supra, 648 F.2d at 1348. The explicit reference to restitution in Section 209 of the ESA was to settle any doubt that "'there was an inherent equitable power in the court to set things right and order restitution.'" Id., quoting S. Rep. No. 507, 92d Cong., 1st Sess. 9 (1971). Section 209 neither limits the power of the court to restitution nor to a particularly strict interpretation of restitution. 648 F.2d at 1348.

Furthermore, to order restitution to the Treasury in these circumstances is consistent with the principle underlying enforcement of the regulations that "[a]ctions taken by the United States under ESA § 209 are taken to enforce public, not private rights. Thus, compensation is 'a by-product of the agency's effort to reestablish compliance with its regulatory scheme.'" Citronelle-Mobile Gathering, Inc. v. Edwards, supra, 669 F.2d at 722.

Indeed, the TECA in Citronelle did not disapprove any and

all payments of restitution to the Treasury; it disapproved only the unconditional payment ordered by the district court. But the TECA itself directed payment into the Treasury, into an escrow account subject to certain conditions. In accordance with that principle, this court shall order Exxon to make restitution of the full amount of the overcharges, plus interest, to the Treasury, for deposit into an escrow account.

The task of this court in delineating the terms and conditions of that account has been made easier by recent Congressional action. On December 21, 1982 Congress enacted Pub. L. No. 97-377, 96 Stat. 1830 (1982) providing continuing appropriations for fiscal year 1983. Section 155 of that law provides a formula for the disbursement of "designated petroleum violation escrow funds", defined as "amounts (not in excess of $200,000,000) which are derived from settlements from alleged petroleum pricing and allocation violations . . . ." The purpose of Section 155 is

> to provide the Secretary of Energy the exclusive authority for the disbursement of the designated petroleum violation escrow funds for limited restitutional purposes (1) which are reasonably expected to benefit the class of persons injured by such violations, and (2) which . . . are likely not to be . . . otherwise refunded to injured persons because the purchasers of the refined petroleum products cannot be reasonably identified or paid or because the amount of each purchaser's overcharge is too small to be capable of reasonable determination.

Pub. L. No. 97-377, § 155(a), 96 Stat. 1830, 1919 (1982).

Under the terms of the new law, the Secretary of Energy

must distribute the escrow fund to the governors of each of the states, with the amount due each state based on that state's share of nationwide consumption of refined petroleum products from 1973 to 1981. Id., § 155(c), (d). Each state must then use the funds under one or more of five existing federal energy conservation programs identified in the new law, including weatherization of buildings; implementing state energy conservation programs; cutting energy consumption in, or finding cheaper alternate energy sources for, schools and hospitals; promoting conservation by small businesses and individuals; and helping poor people pay home utility bills.[58] None of the funds may be used to defray administrative expenses of the DOE or any state. Id., § 155(f).

The court shall order Exxon to make restitution to the United States Treasury of the full amount of the Hawkins Field overcharges, together with interest from the date of overcharge, the monies to be deposited into an escrow account, held in trust by the Department of Energy, to be disbursed in accordance with the procedures set forth in Section 155 of Pub. L. No. 97-377, 96 Stat. 1830, 1919 (1982).

In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution.[59] However, Section 155 clearly

bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs. The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case.

B. Amount of overcharges

The court has held that Exxon should have established a unit BPCL on January 1, 1975, the date a significant alteration in producing patterns occurred at the Hawkins Field Unit, and that Exxon may not claim the incentives of Section 212.75, but instead must proceed under Section 212.72. That done, calculation of Exxon's overcharges becomes a straightforward matter of comparing

SENATOR JOHNSTON

Question 9: Please review the Department of Energy's position in their controversy with the Department of the Interior over prices charged for Federal royalty oil during the period that EPAA price control regulations were in effect. As you may recall, the Administration proposed to address this matter legislatively in the last Congress in the context of the royalty management legislation submitted to Congress. Provide the Committee with your views on this matter and your advice as to what, if anything, now needs to be done about it.

Answer: During the period of crude oil price controls, there were some instances in which the Department of the Interior may have priced its crude oil taken in kind in a manner that did not correspond completely with the regulatory regimen. I am familiar with the solution suggested by the Department of the Interior during the last Congress, but I am advised that this question is now pending in a proceeding before the Department's Office of Hearings and Appeals.

Although it is premature for me to comment on this particular matter before the staff work is completed within the Department, my general view is that such overcharges, if established, should be approached analytically as presenting the same remedy issues as exist in any other crude oil violation. Thus, applying the principles laid down by the Temporary Emergency Court of Appeals, the Department should first look to see if particular identifiable harmed parties exist; and then, if such parties cannot be identified, the principles enumerated by Judge Flannery in United States v. Exxon, C.A. No. 78-1035 (D.D.C. March 25, 1983) (Mem. Op.) should be applied. Were the facts established to be such that the Treasury might receive payment of the overcharges as a remedy, then likewise I believe it would be appropriate for the Treasury simply to retain the proceeds from possible crude oil overcharges such as these.

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